

EMPLOYEE SERVICE DETERMINATION
Southern Pacific Transportation Company
Data Processing Consultants

This is the determination of the Railroad Retirement Board concerning the status of data processing consultants who performed services for Southern Pacific Transportation Company (BA No.1713) (SPTC) under the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA).

Background

The Board's Division of Audit and Compliance conducted an audit of SPTC to determine the accuracy of creditable compensation and service reporting under the RRA and the RUIA. The data processing consultants were identified through a review of IRS Forms 1099 "Miscellaneous Income" and accounts payable invoices issued by SPTC to individuals treated as independent contractors.

Because the audit found that those individuals worked for SPTC for extended periods of time on SPTC property, the question was raised as to whether they were properly classified as independent contractors. SPTC's comments on the coverage report relating to the data processing consultants are noted in the discussion below.

The scope of the investigation was limited to obtaining an understanding of the services performed by the consultants and determining the number of individuals involved, the amount of compensation paid during calendar years 1991 and 1992, the period(s) of time services were provided, and whether the consultants performed service for other clients, as well as to obtain any other information necessary for the Board to make a coverage determination.

Information Gathered About Data Processing Consultants

Data processing consultants were employed by SPTC to provide programming and other data processing services. Systems and projects worked on included the following: (1) car collateral substitution programs, (2) interline settlement statistical studies, (3) empty car management systems, (4) rejected car loading systems, (5) waybill-freight bill projects, (6) clean up projects, and (7) data table up-date servicing.

SPTC was not able to provide written agreements which describe the services performed and conditions of employment, with the exception of one individual. Data processing consultants are paid on a per hour basis with hourly rates ranging from \$15 to

\$60 per hour. SPTC pays pre-authorized travel expenses and special travel to other locations at 30 cents per mile. Reimbursement for services rendered is paid within 10 working days of the date of invoice.

SPTC employed the services of five data processing consultants during calendar years 1991 and 1992. These individuals worked in the Management Services, Treasury, and Logistic Departments of SPTC. The five consultants surveyed performed work as independent contractors for periods ranging from five months to approximately five years. Only one individual currently provides services to SPTC.

Review of Forms 1099 "Miscellaneous Income" issued by SPTC for calendar years 1991 and 1992 show that data processing consultants were paid compensation exceeding \$176,000 in 1991 and \$215,000 in 1992. The Division of Audit and Compliance estimated that three of the consultants worked over 1000 hours for SPTC in calendar year 1992. That estimate is based on dividing the compensation amount paid by the hourly rate. SPTC pointed out in its comments that the amounts reported on Form 1099 include all amounts paid to an independent contractor during a calendar year, including any amounts paid as reimbursement of expenses. As a result, SPTC stated that the estimated hours worked are substantially overstated.

All five data processing consultants stated that they worked on SPTC property located at One Market Plaza, San Francisco, California or at home, depending on the requirements of a particular project. The consultants indicated that they set their own work hours, which generally coincide with those of SPTC. The majority of individuals work Monday through Friday from 8 A.M. to 5 P.M., although some weekend work is required.

All consultants stated that the only reports submitted to SPTC are monthly invoices showing the hourly rate and the number of hours worked during the period. Data processing consultants stated that they do not follow SPTC operating instructions or procedures. Data processing consultants indicated that they are not supervised or controlled by SPTC in the performance of their work.

One individual indicated that she "followed the same procedures and worked in the same department as she had done since 1969." SPTC commented that this individual terminated her employment with SPTC in August 1988 to attend the University of California, Los Angeles. SPTC stated that after that time, she provided service, first as an independent contractor during school breaks and later on a more regular basis.

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Another individual stated that she "followed simple verbal instructions." One of the other consultants stated that he was hired on a part-time basis to train a new employee to perform his prior job functions. That individual previously worked for SPTC from 1950 to 1991, when he retired.

Three consultants stated that they do not perform work for clients other than SPTC. One individual estimated that approximately 67 percent of his income for 1991 was derived from SPTC. Another stated that she performed work for other clients, but provided no estimate of time worked or income derived from other clients.

SPTC commented that one individual was engaged for a specific project and that when the project was completed, she no longer performed services for SPTC. SPTC stated further that that individual performed all services at her own facility and provided all equipment necessary, including her own computer. Her only activity on SPTC property was to review with the responsible official the progress of the contract. SPTC stated that that individual has other clients for whom she provides similar services. She had no office space, office furniture, telephone, computer time, computer terminal or office supplies provided by SPTC. In addition, she did not work full time, and she set her own hours.

In some cases, SPTC provides data processing consultants with the use of office space, office furniture, telephones, computer time, computer terminals and office supplies. One individual indicated that SPTC provided a computer for home use.

Data processing consultants became aware of their jobs through friends or prior SPTC work associates. All five data processing consultants indicated that their businesses were not incorporated. Only one individual's business was registered in his state of residence. None of the individuals advertised their services in trade or business publications.

Four of the five data processing consultants were found to have been employees of SPTC prior to their performing services as independent contractors. The individuals have in excess of the 120 service months necessary to receive retirement benefits under the RRA.

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Discussion and Conclusions

Section 1(b) of the RRA defines the term "employee" to mean "any individual in the service of one or more employers for compensation." Section 1(d)(1) of the RRA provides in pertinent part that an individual is in the service of an employer if:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations. [45 U.S.C. §231(d)(1)(i)].

Section 1 of the RUIA contains essentially the same definition.

The information summarized above indicates that two of the definitions of employee [those in sections 1(d)(1)(i)(B) and (C)] might apply to the data processing consultants. First, the definition in section 1(d)(1)(i)(A) does not apply because the evidence indicates that the consultants are not subject to the continuing authority of SPTC to supervise and direct the manner in which they render their services. Specifically, the consultants do not follow SPTC's operating instructions or procedures when they perform their work. In addition, they set their own work hours. Further, the only reports that the consultants submitted to SPTC were monthly invoices showing the hourly rate and the number of hours worked during the period.

Looking next at the definition in section 1(d)(1)(i)(B), the Board finds that the service performed by the data processing consultants are technical in nature because of the specialized knowledge and expertise which the consultants must possess in order to carry out their services. However, the Board finds further that the consultants are not integrated into the staff of SPTC for a number of reasons. The Board notes the time periods for which each of the five consultants performed services for SPTC as detailed on Exhibit 2 prepared by the Division of Audit and Compliance. That Exhibit shows that on the whole, the

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consultants performed data processing services for confined periods of time, indicating that they worked on a project by project basis. Of the four consultants who had previously worked as employees of SPTC, the employment relationship had ended from as short a time as 3 months to as long as 6 years prior to the time that the individual began providing services as a data processing consultant. The consultants provided their services to the Programming Services office of three different departments. They set their own work hours and worked either on SPTC property or at their homes, depending on the requirements of the project being worked on. SPTC provided data processing consultants with the use of office space, office furniture, telephones, computer time, computer terminals and office supplies in only some cases. Moreover, the consultants did not submit reports to SPTC other than the monthly invoices which set out their hours worked and hourly rate so that they could be paid. The Board finds that the totality of the evidence indicates that the data processing consultants were not integrated into the staff of SPTC and therefore finds that they were not employees within the definition in section 1(d)(1)(i)(B).

Similarly, the Board finds that the data processing consultants were not employees within the definition in section 1(d)(1)(i)(C). The Board finds that the services which they provided may be considered to be professional services in that those services consist of specialized work which can be performed only by individuals who have had particularized training and education. However, the second part of the definition in section 1(d)(1)(i)(C) requires that the individual be integrated into the staff of the employer. The Board has already found that the data processing consultants are not integrated into SPTC's staff.

For the reasons set forth above, the Board finds that the data processing consultants are not employees of SPTC for the calendar years 1991 and 1992, the years which were the subject of the audit by the Board's Division of Audit and Compliance.

Glen L. Bower

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V. M. Speakman, Jr.
(Dissenting opinion attached)

Jerome F. Kever

**Southern Pacific Transportation Company
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TO : The Board

FROM : Catherine C. Cook
General Counsel

SUBJECT: Coverage Determination
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Attached is a proposed coverage ruling for Board approval.

Attachment